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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 701

BENDIX AVIATION CORPORATION,

Appellant,

vs.

INDIANA DEPARTMENT OF STATE REVENUE, INDIANA REVENUE BOARD, INDIANA GROSS INCOME TAX DIVISION,

Appellee.

APPELLANT'S BRIEF IN REPLY TO APPELLEE'S MOTION TO DISMISS.

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Pursuant to Rule 16 (3) of this Court, Appellant in the above entitled cause files this brief in opposition to Appellee's Motion to Dismiss.

We respectfully request this Court's forbearance so that we may make brief comments upon the sections of Appellee's Motion to Dismiss entitled, "Questions Presented" and "Statement", and then combine this material in a single discussion under "Argument".

QUESTIONS PRESENTED.

Question A as stated by Appellee consists of Appellant's Question 1 of the Jurisdictional Statement; to which has been added the first alternative as presented in Question

2 of Appellant's Jurisdictional Statement. Question A is faulty because Appellee fails to identify the carrier as a "common" carrier and Appellee assumes with finality that the "inspection and acceptance" provisions of the contracts between Appellant and the United States of America are legally and factually identical to the "acceptance" in *Department of Treasury* v. *Wood Preserving Corporation,* 313 U. S. 62, 61 S. Ct. 885.

Question B as presented in Appellee's motion to dismiss suffers equally from these defects.

STATEMENT.

In the first grammatical paragraph of Appellee's Statement (Appellee's Motion p. 4) appears an inadvertent error as to date. The taxes sought to be recovered were paid upon gross receipts received between January 1, 1951, and September 30, 1953.

Appellee's Statement is relatively extensive and the facts therein stated are true, but there are other facts which are also true. All of these must be considered together in order to gain a complete and accurate picture of the nature and meaning of the numerous contractual provisions relating to "inspection and acceptance." The Statement in Appellee's Motion collects and presents those facts which Appellee feels will aid in establishing an identity of "acceptance" in the instant case and the *Wood Preserving* case. The fallacy of basing the Questions Presented above and the Statement on the hope of establishing this necessary assumption will be discussed in the Argument below.

The last paragraph of the Statement by Appellee notes that "appellant has not questioned the facts as stated in the opinion of the Supreme Court of Indiana, either by its Petition for Rehearing * * * or by its Jurisdictional State-

ment. * * *" If Appellee means that the Appellant has not questioned the statement by the Supreme Court of Indiana of separate, specific, individual facts, then, the Appellee is correct. If, however, Appellee means that Appellant has not questioned the interpretation given to the facts, or the meaning in law assigned to the facts, or the significance constitutionally of the facts as stated by the Supreme Court of Indiana, then Appellee's notation is inaccurate. We respectfully point out that the meaning and applicability of cases relied on by the Supreme Court of Indiana in its opinion and its analysis of the facts and the principles of constitutional interpretation applied by it were questioned in the Petition for Rehearing filed in that Court and that the questions there raised are preserved by the Jurisdictional Statement. Of twelve points raised in the Petition for Rehearing, eight challenge the meaning of the facts as decided or apparently decided by the Supreme Court of Indiana. Of these, Point 7 of the Petition specifically raises the question differentiating the *Wood Preserving* case from the facts of this case. In the Jurisdictional Statement this problem was preserved for consideration by this Court by references to be found on Page 11, including the footnote on that page, and particularly the material at the bottom of Page 11 and the top of Page 12, referring specifically to the *Wood Preserving* case and calling the attention of this Court to the ruling of the Trial Judge on this point. The point was discussed beginning at the bottom of Page 16 by reference to *Gross Income Tax Division* v. *Conkey*, 228 Ind. 352, 90 N. E. (2d) 805; cert. den. 340 U. S. 941, 71 S. Ct. 504, and by a series of references to decisions of this Court which were submitted as indicative of the factors considered by this Court on questions of this kind although, we submit, the particular point itself remains undecided. Moreover, reliance upon *Wood Preserving* is challenged on Page 19 through the middle of Page 22, and the specific interpretation of

"inspection and acceptance", which is assumed as true by Appellee in its Argument, is specifically raised on Page 23 of the Jurisdictional Statement under the heading Questions 2 and 3. This is felt to be appropriate in view of the fact that although the point was mentioned, it did not appear to be relied upon in the decision of the Supreme Court of Indiana.

ARGUMENT.

IN REPLY TO POINTS I AND II OF APPELLEE'S ARGUMENT.

Appellee's Assumption in the Stipulation of the Parties and the Lower Courts.

Appellee's Motion to Dismiss represents Appellee's decision to rely upon a certain legal conclusion, much disputed in both lower courts, as though the facts marshalled by the Appellee necessarily lead to the conclusion. Points I and II of Appellee's Argument stem entirely from this unwarranted assumption. Without this assumption the Appellee's Motion is without merit. It is our purpose to demonstrate that the assumption itself is without merit.

The impropriety of the assumption by Appellee that the "acceptance" in this case is identical with the "acceptance" in *Wood Preserving* may be demonstrated in three ways.

1. Paragraph 3 of Sub-section A of Appellee's Motion refers to the "Material Inspection and Receiving Report", which has been informally identified in the course of this case as Form DD250, and is formally designated as Stipulation Exhibit "F" (Tr. p. 97). Appellee recites a portion of the history of the use of this Form DD250 in its Statement, but makes no mention of the fact that the copy thereof which Appellant received from the Government was not signed or distributed to Appellant until after the goods manufactured and sold by the Appellant were delivered by the Appellant to the United States Government, by loading on board a common carrier and the common carrier had taken off on its interstate journey (Tr. p. 68, l. 18 to p. 69, l. 6). This one omitted fact alone cast sub-

stantial doubt upon the validity of the assumption necessary to establish Appellee's points of Argument I and II.

2. Appellee argued strenuously and at length in the Trial Court to establish, as the legal meaning of the facts, this very assumption. The argument was rejected by the Trial Court and this result is reported in the Jurisdictional Statement beginning with the last grammatical paragraph on Page 11 and extending to Page 12 thereof. The opinion of the Trial Court on this point may be examined beginning at Page xxi of Appendix B of the Jurisdictional Statement.

3. The same argument was made by the Appellee in its Brief filed with the Supreme Court of Indiana under subheading B of point I of its Argument, and its effort to establish this point was continued vigorously in its Reply Brief to the same Court, particularly in the Conclusion in said brief beginning on Page 26 thereof. The Supreme Court of Indiana made reference to the argument and cites still another factual portion of the Stipulation omitted by Appellee, a quotation from Section XIV of the Armed Services Procurement Regulation. This provision simply indicates that "acceptance" may come before or after, or simultaneously with the passage of title and the Supreme Court of Indiana says (Page x, Appendix A of the Jurisdictional Statement), "The above provisions seemed to us to cover the situation adequately so far as we are here concerned." Thereafter the Court in its decision relies upon the *Wood Preserving* case and others, but eliminates any further consideration of the "acceptance" argument of the Appellee. Instead, the Supreme Court of Indiana urges the combined points (1) that title passed by the law of sales and (2) the common carrier was acting as an "agent" of the United States Government which, therefore, was picking up its own goods in the way the railroad picked them up in the *Wood Preserving* case and

the way the customer picked up the goods in the Class D sales in *International Harvester Company* v. *Department of Treasury*, 322 U. S. 340; 63 S. Ct. 1019; 64 S. Ct. 1030. The identity of "acceptance" in the instant case and *Wood Preserving* is not relied upon by the Supreme Court of Indiana unless the sentence from its opinion cited above shows such reliance. (Appendix A, pp. xi-xvi, Jurisdictional Statement).

Appellee's Ten Common Factors.

Appellee sets out ten factors billed as being common to this case and *Wood Preserving*. We shall follow the numbering arrangement of Appellee's Motion to Dismiss beginning at Page 11. We concede that Factors 1 and 2 are common to both cases The remaining "common" factors reveal traits of marked diversity.

Factor 3. In *Wood Preserving* the parties recognized that the purchaser would transport its goods to points outside of Indiana in the purchaser's own conveyance (purchaser was a common carrier, but took the goods as purchaser only and not as common carrier). In this case, the contracts recognized that seller would deliver the merchandise on board the conveyance of a common carrier, which would transport the purchaser's goods (title to which passed in Indiana at the moment of delivery on board the common carrier) to that destination outside of Indiana called for in the shipping papers.

Factor 4. In *Wood Preserving* the purchaser by its agent inspected the goods and accepted those which were approved in the sense that the acceptance was of quantity and quality plus the acceptance both of title and physical possession and domination over the goods. In this case the purchaser by its agent (the Government Chief Inspector) accepted the goods which were approved in the sense

that the acceptance was of quantity and quality, but the contracts provided and the actions of the parties resulted in delivery, not to the purchaser, but to a common carrier for immediate carriage and delivery to the purchaser at a destination outside of Indiana.

Factor 5. In *Wood Preserving* the sale was completed in Indiana through the acquisition by the buyer of the goods, title thereto, possession thereof, physical domination thereover, by deposit upon one of the purchaser's own conveyances. In this case the sale was completed in Indiana by virtue of the law of sales. But, by virtue of the delivery on board a common carrier for immediate shipment to a destination outside of Indiana, the sale was also completed in Indiana as a part of the stream of interstate commerce. The control over the goods which the purchaser had was different in substance from the control in *Wood Preserving* and was identical in theory to that which is discussed in *A. G. Spaulding & Bros.* v. *Edwards*, 262 U. S. 66, 43 S. Ct. 485, with quotation appearing pp. 18-19 Jurisdictional Statement.

Factor 6. In *Wood Preserving* the goods were loaded upon the carrier in Indiana, not as carrier but as conveyance of purchaser. In this case the goods were loaded not upon the conveyance of purchaser, but upon carrier as "common carrier."

Factors 7 and 8. In *Wood Preserving*, the delivery was f.o.b., not the seller's place of business, but the purchaser's place of business, and with that delivery to the purchaser in Indiana the transaction contemplated by the parties was ended. The bill of lading in the *Wood Preserving* case did not speak the truth for the goods were already both in the possession of and in the conveyance of the purchaser. In the instant case the delivery is f.o.b. the equipment of the common carrier itself and the bill of lading speaks the truth—the goods are in the stream of interstate commerce.

Factor 9. The statement as made is true but it does not specify the very substantial difference between the kind of liability that attaches when the public means of conveyance is used as opposed to that which is true when the owner himself takes over the goods.

Factor 10. This statement, too, is technically true, but it is one thing to say that the purchaser himself, with the goods in his possession, has the absolute power and right to divert, and another thing entirely to say that the purchaser has such power and right but only through directions to a common carrier. (See *A. G. Spaulding & Bros.* v. *Edwards,* 262 U. S. 66, 43 S. Ct. 485.)

Appellee's Position in Its Official Instructions and in Its Brief in Wood Preserving.

It is likely that Appellee's position as expressed in the Motion to Dismiss is more strongly stated than held. In the present Regulations of the Indiana Department of State Revenue, being *Regulations 56, Series VIII,* effective January 31, 1956, and prepared after this litigation was pending, there are two rules stated under Instruction 11-8, as follows:

> "Rule 2. Income is taxable if it is derived from a sale of goods shipped from a point in Indiana on a Government bill of lading to an out-of-state destination."
>
> "Rule 4. Income is not taxable if it is derived from sales of goods which are picked up in Indiana by a common carrier, which was ordered to do so by the out-of-state purchaser, and delivered to an out-of-state destination."

The obvious fact that a common carrier could no more be an agent under Rule 2 than under Rule 4, is a considerable argument without words.

In its Instruction 11-1 the Department specifically states

that it recognizes non-taxability as a general rule of income from sales of personal property upon receipt of a prior order and if by the terms of the sale agreement the Seller is required to and does ship from a point in Indiana to a purchaser or to a consigneee designated by the purchaser to a destination outside of Indiana, including shipments made on bills-of-lading showing Seller or customer, or third party as the shipper of record. At this point there is a parenthetical exception for cases in which inspection and acceptance is at the seller's place of business prior to shipment and when shipments are made on Government bills-of-lading. Shipments made on commercial bills-of-lading in which the customer or a third party, the customer's customer, is the shipper of record, are transactions in which delivery is made free on board the common carrier, title passing at that moment, and the shipper of record becomes the party in contract relationship with the common carrier. In terms of interstate commerce everything true about a Government bill-of-lading under these circumstances is also true of a commercial bill-of-lading, but Indiana recognizes the latter only as nontaxable.

When the State of Indiana sought certiorari in *Wood Preserving*, its brief in support of its petition specifically recognized the distinction now made by this Appellant and now denied by Indiana:

> "Goods bought in one state for transportation to another state in cases where title passes in the latter state constitutes interstate commerce in its simplest conception. Upon the same principle it is held that where there was a regular course of business contemplated by the parties which took the goods sold into another state as an essential part of the transaction, and where by mutual agreement such goods are put into the hands of a third person, a common carrier, for transportation to the latter state,—that in such case interstate commerce is involved. But,

where the buyer accepts delivery and title upon its own property in the seller's state and the subsequent transportation is made via the buyer's transportation facilities, the transaction is intrastate notwithstanding the seller may at the time have known of the course of business whereby the buyer was to make further transportation of such goods."

(Records of the Supreme Court of the United States Vol. 151, Transcripts of Records and file copies of briefs, p. 19, Cause No. 654, October Term, 1940, petition for a writ, etc., and brief in support thereof.)

We believe that the instant case and *Wood Preserving* are not comparable in any manner that would have a substantial effect upon the issue before this Court. Comparison may better be made between the instant case and *Nudelman* v. *Globe Varnish Company*, 114 Fed. (2) 916; cert. den. 312 U. S. 690, 61 S. Ct. 621.

In Reply to Point III of Appellee's Argument.

Point III of Appellee's Argument is simple and direct—this appeal should be dismissed because multiple taxation is not possible. On pages 22 and 23 of the Jurisdictional Statement Appellant referred to this question and the constitutional questions inherent in it.

"Burden" as actual or possible by way of multiple taxation, and "burden" as "one single tax-worth of direct interference with the free flow of commerce" (*Freeman* v. *Hewit*, 329 U. S. 249, 256; 67 S. Ct. 274, 279) remains a vital and undetermined question in interpretation of the Commerce Clause. Is a direct and unapportioned tax a burden? Is a transaction to be protected when the customer is an ordinary commercial firm and in danger of taxation elsewhere, and not to be protected when the customer for the same goods is the United States and, therefore, in no danger of taxation elsewhere? Is

the nature of the transaction controlling or the nature of the customer? The statement "multiple taxation is not possible" applied to the facts in this case itself raises a substantial federal question.

In Reply to Point IV of Appellee's Argument.

Point IV of Appellee's Argument is based on the identical assumption with reliance upon the identical legal reasoning as it has applied to gross receipts of Appellant arising from prime contracts, but here there is added an inference which is contrary to the specific language of the contracts, *i. e.*, since the Government was satisfied how could the prime contractor complain—an inference that avoids Question 3 of the Jurisdictional Statement instead of answering it.

CONCLUSION.

We submit that the Argument under Points III and IV of Appellee's Motion to Dismiss does not eliminate the need for consideration of the federal questions therein discussed. We submit that in Points I and II of the Argument in Appellee's Motion to Dismiss the basic assumption made by Appellee is shown to be unwarranted, that the alleged comparability of the instant case and *Wood Preserving* is nonexistent and that the further argument required to establish the point made by Appellee remains a substantial federal question.

We submit that the kind of cases relied upon by the Indiana Supreme Court and Appellee to show that a common carrier is the agent for the Government in receiving the goods manufactured by Appellant for transportation to destinations outside of Indiana result in an argument erroneous in the area of general law and erroneous also in the field of constitutional law. The word, "agent" as

used in *Illinois Central R. R. Co. v. U. S.*, 265 U. S. 209, 44 S. Ct. 485, and cited by the Supreme Court of Indiana. (Appendix A, p. xii Jurisdictional Statement), is not employed as a technical term in the law of principal and agent but is a word being used generally as descriptive of the existence of a relationship between the United States and the carrier rather than between the carrier and the contractor. We further submit that the concept of agency applied with mechanical precision by Appellee or by the Supreme Court of Indiana, for a purpose other than determining liability between principal and agent, constitutes a misuse of the concept. If common carriers are to be considered agents of consignees under bills-of-lading handed to them when f.o.b. delivery is made on board their equipment, and the *International Harvester* case Class 4 rule is to apply to every f.o.b. delivery in the state of origin, that determination should be made only by this Court, and only after a full consideration of the law and the potential dangers to the meaning and continuing interpretation of the commerce clause.

We respectfully urge that Appellee's Motion to Dismiss be denied and that the Court permit briefs to be filed and oral argument to be heard on these substantial and unique federal questions.

Respectfully submitted,

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